

The claimant was in partial unemployment after the employer reduced his hours from 27 to five hours per week due to attendance and poor work performance. However, after the claimant declined additional work in more supervised departments, he no longer qualified for partial unemployment benefits, because the lack of work was the claimant's own choosing.

**Board of Review
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Issue ID: 0025 9223 78

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

After experiencing a reduction in work hours, the claimant filed a claim with the DUA, effective June 10, 2018, and was awarded partial unemployment benefits in a determination issued on September 21, 2018. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision dated December 25, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that because the employer continued to offer work to the claimant, he was not in unemployment, and, thus, he was disqualified under G.L. c. 151A, §§ 29(a) and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to obtain further evidence about whether the employer had reduced the claimant's hours. Both parties participated in the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. However, it was necessary to remand the case again to obtain further subsidiary findings from the record about if and when the employer subsequently offered the claimant additional hours of work. The review examiner has now returned her revised consolidated findings. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's original decision, which concluded that the claimant was not in unemployment, is supported by substantial and credible evidence and is free from error of law, where the record shows that after providing the claimant with 27 hours of work per week for two years, the employer reduced the claimant's hours to five hours a week, but later offered more work in another department, which the claimant refused.

Findings of Fact

The review examiner's revised consolidated findings of fact and credibility assessment are set forth below in their entirety:

1. The claimant opened his existing claim on June 19, 2018 with an effective date of June 10, 2018.
2. The claimant began employment as a part time custodian with the employer on April 1, 2016.
3. The claimant is still employed by the employer.
4. The employer does not guarantee a set number of work hours per week to part time employees.
5. At the time of hire, the employer did not promise the claimant a minimum number of hours per week.
6. The employer schedules part time employees for work according to the employer's business needs.
7. From the date of hire through May 2018, the employer scheduled the claimant to work about 27 hours each week.
8. As of May 2018, the employer's Store Director gradually reduced the claimant's schedule because the employer was not satisfied with the claimant's job performance and his absenteeism.
9. In early May 2018, the employer reduced the claimant's schedule to 20 hours because the employer was not satisfied with the claimant's job performance and his absenteeism.
10. In late May 2018, the employer reduced the claimant's schedule to 20 hours because the employer was not satisfied with the claimant's job performance and his absenteeism.
11. In May 2018 to the early part of June 2018, the employer reduced the claimant's schedule to 20 hours [sic] because the employer was not satisfied with the claimant's job performance and his absenteeism.
12. During the period beginning June 10, 2018, the employer continued to schedule the claimant to work 5 hours each week.
13. The employer believed that the claimant's poor job performance was [d]ue to his lack of supervision during his shifts.

14. In approximately July 2018, the claimant complained to the employer about his lack of work hours.
15. In approximately June or July 2018, the employer made several offers to the claimant to work in its produce and dairy departments as a means to increase his work hours from five hours per week.
16. The employer believed that the claimant's job performance would improve in the produce and dairy [departments] because the claimant would have supervision during his shifts in those departments.
17. The claimant declined to work in another department because he was hired to work in the maintenance department.

Credibility Assessment:

The claimant offered contradictory statements that at the time of hire, the employer did not promise that he would be offered a set number of hours each week. Later in the hearing, the claimant offered that he was guaranteed 20-27 hours each week. The claimant denied being offered other positions to increase his hours. However, he admits that he was offered work in the produce department which he declined because he was hired to work in the maintenance department.

The employer's witness denies that any guarantee of hours was made to the claimant. He further offered that the employer does not guarantee a set number of work hours per week to part time employees. The employer further offered that when the claimant complained about his reduced hours, during June and July 2018, the employer offered additional hours in other departments where the claimant would be supervised. Such offers would be reasonable given the employer's stated concerns that led to the reduction of the claimant's work hours.

While the claimant denies that the employer offered other positions to increase his hours, such contention is less probable given the claimant's own admission that work was indeed offered to him to work in the produce department.

Given the above, it is concluded that the employer's testimony is more credible.

Ruling of the Board

In accordance with our statutory obligation, we review the record and the decision made by the review examiner to determine: (1) whether the revised consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We believe the review examiner mistakenly wrote 20 hours in Consolidated Finding # 11 instead of five hours. This is because Consolidated Finding # 12

states that the employer *continued* to schedule the claimant for five hours each week.¹ In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We further believe that the review examiner’s credibility assessment is reasonable in relation to the evidence presented. However, we believe the revised consolidated findings of fact allow for the award of partial unemployment benefits for a period of time at the beginning of the claim, as discussed more fully below.

In her original decision, the review examiner concluded that the claimant was not in unemployment pursuant to G.L. c. 151A, §§ 29(a) and 1(r). G.L. c. 151A, § 29(a), authorizes benefits to be paid to those in total unemployment. Total unemployment is defined at G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

“Total unemployment”, an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable and available for work, he is unable to obtain any suitable work.

Consolidated Findings ## 3 and 12 show that the claimant continues to work for the employer five hours per week. Because he was performing some wage-earning services, we agree that the claimant was not in total unemployment.

We must also consider whether the claimant is eligible for partial unemployment benefits. G.L. c. 151A, § 29(b), authorizes benefits to be paid to those in partial unemployment. Partial unemployment is defined at G.L. c. 151A, § 1(r)(1), which provides, in relevant part, as follows:

“Partial unemployment”, an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week

Although the review examiner found that the employer did not guarantee the claimant a set number of hours when hired on April 1, 2016, it is apparent that he was regularly scheduled for 27 hours per week for two years. *See* Consolidated Findings ## 2, 5, and 7. Then, in a matter of weeks from May through early June, 2018, the employer reduced his hours down to five per week. Consolidated Findings ## 8–11. At the time the claimant filed his claim, he was working this reduced regular schedule of five hours per week. *See* Consolidated Finding # 12.

Because the claimant’s regular part-time work schedule was involuntarily reduced by the employer, he was in partial unemployment when he filed his claim on June 19, 2018. *See* DUA Service Representative Handbook § 1405(B). However, at some point in June or July, the employer offered him work in other departments, which would have increased his hours, and the claimant turned it down. Consolidated Findings ## 15 and 17.

¹ Additionally, five hours per week at this point in time is consistent with the review examiner’s first set of consolidated findings.

When read together, the above statutory provisions allow for the payment of benefits to individuals who, though capable and available for full-time work, are unable to get those hours. *See also Leone v. Dir. of Division of Employment Security*, 397 Mass. 728, 733 (1986) (the purpose of the unemployment compensation statute is to assist those who are voluntarily “thrown out of work through no fault of their own”), *citing Olmeda v. Dir. of Division of Employment Security*, 394 Mass. 1002, 1003 (1985). In the present appeal, when the claimant turned down the employer’s offer for more hours simply because he had not been hired to work in those departments,² he became responsible for his lack of work. From that point forward, we conclude that the claimant was no longer in partial unemployment within the meaning of the statute.

Unfortunately, neither party seemed able to provide specific testimony about when those offers were made or turned down. Consequently, the revised consolidated findings state that these offers were made in “approximately June or July, 2018.” Pursuant to G.L. c. 151A, § 74, the Legislature requires us to construe the unemployment statute liberally in order to lighten the burden of the unemployed worker. Given this finding and the legislative directive, we conclude that the offers were made in late July.

We, therefore, conclude as a matter of law that after the employer reduced the claimant’s hours, he was in partial unemployment within the meaning of G.L. c. 151A, § 29(b), until the employer offered additional work, which the claimant refused.

² Nothing in the record indicates that the work offered to the claimant in the employer’s produce or dairy departments was unsuitable for the claimant.

The portion of the review examiner's decision that disqualified the claimant beginning the effective date of his claim, is reversed. The portion of the review examiner's decision that disqualified the claimant after the final week of July, 2018 is affirmed. The claimant is entitled to receive benefits for the period June 10, 2018, through July 28, 2018, if otherwise eligible. The claimant is denied benefits beginning July 29, 2018, and for subsequent weeks until such time as he meets all the requirements of G.L. c. 151A, §§ 29(a), 29(b), and 1(r)(1) and (2).

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 8, 2019



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

AB/rh